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No. 02-914

In The
Supreme Court of the United States

CITY OF MAYFIELD HEIGHTS,
MAYOR MARGARET A. EGENSPERGER, *et al.*,

Petitioners,

v.

MICHAEL A. SHEMO, TRUSTEE, AND
LARRY GOLDBERG, TRUSTEE,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Ohio

PETITIONERS' REPLY BRIEF

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RESPONSE TO COUNTER STATEMENT OF THE CASE

We will not engage in a point-by-point refutation of Respondents' Michael A. Shemo, Trustee, and Larry Goldberg, Trustee (collectively "Trustees") inflammatory exposition of facts. Petitioners (collectively "Mayfield Heights" or "the City") have raised on this appeal solely the decision of the Ohio Supreme Court granting the Petitioners' petition for a writ of mandamus to compel Mayfield Heights to appropriate the Trustees' property in the case of *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St. 3d 59, 765 N.E.2d 345 (2002) (App. 1)[1] predicated upon the holding of the Ohio Supreme Court in the case of *Shemo v. Mayfield Hts.*, 88 Ohio St. 3d 7, 722 N.E.2d 1018 (2000) that the single-family zoning classification of the Trustees' property failed to substantially advance the public health, safety and welfare. The court issued the writ of mandamus, holding that a categorical taking had occurred by reason of the limitations imposed by the Zoning Ordinance and that the Trustees were entitled to compensation for the temporary taking of their property prior to its rezoning to retail as they requested.

At pages 6 to 8 of their Brief, the Trustees complain about the difficulties they had in gaining approval for their proposed road improvements. The Supreme Court of Ohio issued a peremptory writ compelling the City of Mayfield Heights to approve the Trustees' road improvement plans, including the passage of commercial vehicles

[1] The reference is to the Appendix in the Petition for a Writ of Certiorari.

on Maplewood Drive through a residential neighborhood. *State ex rel. Shemo v. Mayfield Hts.*, 93 Ohio St. 3d 1, 755 N.E.2d 354 (2001) (App. 20). The ruling was entered even though in *Shemo v. Mayfield Hts.*, 88 Ohio St. 3d 7, 722 N.E.2d 1018 (2000) (App. 34) the court, in discounting the influence of traffic congestion, pointed out that the Trustees "propose to limit direct access from their property to the residential streets to cases of emergency only." (App. 42). Much of the fervent opposition from the City of Mayfield Heights and its Mayor, Margaret A. Egensperger, described at App. 22-23 in *State ex rel. Shemo v. Mayfield Hts.*, 93 Ohio St. 3d 1, 755 N.E.2d 354 (2001) resulted from the release of the limitation pertaining to commercial traffic.

At pages 6 and 7 of their Brief, the Trustees protest that the City of Mayfield Heights "frivolously" raised the issue of the paper streets in the platted but undeveloped subdivision. The City's claim to ownership was not frivolous. The Ohio Supreme Court held in *Eggert v. Puleo*, 67 Ohio St. 3d 78, 616 N.E.2d 195 (1993), in the first paragraph of the syllabus, "[P]ursuant to R.C. 711.07, when a plat approved by a municipal corporation is recorded in the office of the county recorder, the fee of the land designated in the plat for public use vests in the municipal corporation." The City may, if it establishes it is in the public interest, sell its fee simple interest in platted but unimproved streets. *Bayer v. North College Hill*, 31 Ohio App. 3d 208, 510 N.E.2d 400 (1986). The stipulated judgment entry provided for vacation of the paper streets upon conveyance by the Trustees to the City of 1.3 acres of land [Exhibit 14 to Evidence of Relators filed in the Ohio Supreme Court in *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St. 3d 59, 765 N.E.2d 345 (2002) (App. 1)].

The foregoing facts are irrelevant to this proceeding. We raise them only to counter in part the Trustees' obsession of ill treatment.

I. The Holding Of The Ohio Supreme Court In This Case That A Categorical Taking Arises By Reason Of The Failure Of The Single-Family Zoning Of The Trustees' Property Fails To Substantially Advance A Legitimate Governmental Interest Conflicts With The Holdings Of This Court In *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465 (2002), and *Armstrong v. United States*, 364 U.S. 40 (1960), And Is A Final Judgment Reviewable By This Court.

The significance of the holdings of the cases referenced in this heading was pointed out by this Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, at 122 S.Ct. 1478 as follows:

> We shall first explain why our cases do not support their proposed categorical rule – indeed, fairly read, they implicitly reject it. Next, we shall explain why the *Armstrong* principle requires rejection of that rule as well as the less extreme position advanced by petitioners at oral argument. In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither "yes, always" nor "no, never"; the answer depends upon the particular circumstances of the case. Resisting "[t]he temptation to adopt what amount to *per se* rules in either direction," *Palazzolo v. Rhode Island*, 533 U.S. 606, 636, 121 S.Ct. 2448, 150 L.Ed.2d 592

(2001) (O'CONNOR, J., concurring), we conclude that the circumstances in this case are best analyzed within the *Penn Central* framework.

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries." *Penn Central*, 438 U.S., at 124, 98 S.Ct. 2646, designed to allow "careful examination and weighing of all the relevant circumstances." *Palazzolo*, 533 U.S., at 636, 121 S.Ct. 2448 (O'CONNOR, J., concurring).

This Court should accept jurisdiction on the authority of *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), in which this Court took jurisdiction in order to settle important First Amendment issues even though that case had not been finally disposed of in that the issue of damages remained to be tried. As with the judgment of the Georgia Supreme Court in *Cox Broadcasting*, the judgment of the Ohio Supreme Court in this case "is plainly final on the federal issue and is not subject to further review in the state courts." *Id.* at 485.

It is unlikely that any federal issues will arise from the trial to determine compensation. The amount of compensation to be paid is a factual issue to be determined by jury on settled instructions which do not reach constitutional proportions. The eminent domain cases reaching this Court from the states for review of constitutional issues relate to the authority of the appropriating entity to take private property, not to the issue of compensation. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Cincinnati v. Vester*, 281 U.S. 439 (1930).

The case of *State of Washington ex rel. Grays Harbor Logging Company v. Coats-Fordney Logging Company*, 243 U.S. 251 (1917) is frequently cited in dictum for the proposition that an eminent domain case is not final for purposes of review by this Court until it is concluded through trial and appropriation. See, *Cox Broadcasting Corporation v. Cohn*, at 420 U.S. 477, n. 6. *Grays Harbor Logging Company* concerned a physical taking of property in which the owner unsuccessfully challenged in the state court the right of the appropriator to take the property. This Court denied review because under the law of the State of Washington the judgment sustaining the right of the appropriator was interlocutory.

As noted above, this Court in *Tahoe-Sierra Preservation Council*, noted the significant distinction between physical takings and regulatory takings and added at 122 S.Ct. 1479:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has

> been a "regulatory taking," and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way – often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights. "This case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use," *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998); instead the interference with property rights "arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S., at 124, 98 S.Ct. 2646.

The "final decision" in this regulatory taking case was made when the Ohio Supreme Court compelled the City to initiate appropriation proceedings. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 744, and SCALIA, J., concurring at 750 (1997).

A final decision has been made. It is not reviewable by the Ohio courts. This case is ripe for review and the Court should accept jurisdiction so as not to leave unanswered the question of whether a land use regulation that fails to substantially advance a governmental interest categorically

constitutes a taking. This case raises the additional question of whether the Takings Clause of the Fifth Amendment to the United States Constitution provides a remedy for such a regulation.

II. The Decision Of The Ohio Supreme Court Is Clearly Governed By Federal Law.

The decision of the Ohio Supreme Court in this case, *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St. 3d 59, 765 N.E.2d 345 (2002), is premised upon and follows this Court's decisions on regulatory takings. The only reference to the Ohio Constitution is at 95 Ohio St. 3d 63 (App. 7), where it states:

> The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation. Fifth and Fourteenth Amendments to the United States Constitution; Section 19, Article I, Ohio Constitution.

The court goes on to hold:

> We must first determine whether relators have established a compensable taking of their property.
>
> The United States Supreme Court has consistently held that "application of land-use regulations to a particular piece of property is a taking only 'if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land.'" See *United States v. Riverside Bayview Homes, Inc.* (1985), 474 U.S. 121, 126, 106 S.Ct. 455, 88 L.Ed.2d 419, quoting *Agins v. Tiburon* (1980), 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106;

> *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987), 480 U.S. 470, 485, 107 S.Ct. 1232, 94 L.Ed.2d 472.
>
> We have also adopted this test for a taking caused by a zoning law. See *Goldberg Cos., Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St. 3d 207, 211, 690 N.E.2d 510, quoting *Agins*, 447 U.S. at 260, 100 S.Ct. 2138, 65 L.Ed.2d 106. ("'The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land * * *'").

And at 95 Ohio St. 3d 64 and 65 (App. 9, 10), it discussed and founded its decision upon what it called the "*Agins* disjunctive test." Its decision in *Goldberg Cos., Inc. v. Richmond Hts. City Council*, 81 Ohio St. 3d 207, 690 N.E.2d 510 (1998) discusses and follows this Court's decisions with regard to regulatory takings.

Were it to have founded its conclusion independently upon the Ohio Constitution, it would have been obliged to overrule its decisions holding that the Takings Clause of the Ohio Constitution, Section 19 of Article I, is limited to the acquisition of property to be devoted to public use. *State ex rel. Fejes v. Akron*, 5 Ohio St. 2d 47, 213 N.E.2d 353 (1966); *McKee v. Akron*, 176 Ohio St. 282, 199 N.E.2d 592 (1964); *Superior Uptown, Inc. v. Cleveland*, 39 Ohio St. 2d 36, 313 N.E.2d 820 (1974). See, also, *In Re Appropriation of Easements From Leas*, 5 Ohio App. 3d 120, 449 N.E.2d 780 (1981). In *McKee v. Akron*, the court at 176 Ohio St. 284, after quoting Section 19, Article I, held, "[I]t should be noted that this section limits the right to compensation to cases where private property is *taken* for public use. If the framers of the Ohio Constitution intended to

require compensation whenever property was damaged by governmental activity, they could have so provided in unmistakable language."

In overruling the City's motion for reconsideration, the court in *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St. 3d 379, 775 N.E.2d 493 (2002) (App. 46) dismissed *Superior Uptown, Inc. v. Cleveland* as a claim for money damages and not as authority for the contention that a zoning ordinance held to be unconstitutional is rendered invalid, but that no action lies for the payment of compensation. We submit that that reading of the case is strained. The court, after holding the ordinance unconstitutional and invalid, held at 39 Ohio St. 2d 39:

> The award of damages against the city of Cleveland cannot stand. That award was based upon the deprivation of use of its property allegedly suffered by appellee during the period the rezoning ordinance was in effect. Many of the cases cited by appellee are appropriation cases and, therefore inapposite. There is no evidence in the record to support a finding that the rezoning ordinance was a disguised attempt by the appellant to take appellee's property for a public purpose. Such a taking is a precondition to the exercise of the eminent domain power.

Clearly, regulatory taking law in Ohio follows this Court's decisions with respect to the subject and is not based upon a reinterpretation of Section 19, Article I of the Ohio Constitution, which has stood unchanged since 1851.

III. Raising The Questions Below

At page 7 of the Petition, the City points out in its motion for reconsideration that the First Question Presented

relating to the holding of the Ohio Supreme Court that a categorical taking had occurred was erroneous by reason of this Court's decisions in *Penn Central Transportation Company v. City of New York* and *Palazzolo v. Rhode Island*. At that page it is pointed out that the court rejected the argument. In overruling the City's motion for reconsideration at App. 49, the court admonished the "attempted reargument of this contention."

With respect to the Second Question Presented, at page 9 of the Petition the City points out an excerpt from its brief in support of its motion for reconsideration, in which it argued that the Due Process Clause, and not the Takings Clause, applied to this case. At footnote 19 on page 22 of the Trustee's Brief in Opposition references made to the City's motion for reconsideration where this issue was raised with reference to Ohio law. Ohio law incorporates federal law in following this Court's holding in *Nectow v. Cambridge*, 277 U.S. 183 (1928). *State ex rel. Synod of Ohio Lutheran Churches of America v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 515 (1942). In denying the motion for reconsideration, the Ohio Supreme Court rejected this argument.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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